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No. 747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED AIRCRAFT CORPORATION
(Hamilton Standard Division), *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 141 et seq.):

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Aircraft Corporation (Hamilton Standard Division) prays that a writ of certiorari issue to review the opinion and decree of the United States Court of Appeals for the Second Circuit issued and entered in this case on July 8, 1964 and July 27, 1964, respectively, rehearing denied on September 21, 1964.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (herein called the Board) is reported at 144 N.L.R.B. No. 56, and is printed in the Joint Ap-

pendix filed herewith (J.A. 2).[1] The opinion of the Court of Appeals is reported at 333 F. 2d 819, and is printed in Appendix A hereto, *infra,* pp. 1a-5a.

JURISDICTION

The decree of the Court of Appeals was entered on July 27, 1964, rehearing was denied on September 21, 1964 (*infra,* p. 5a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Without a preceding finding in a representation proceeding under Section 9 of the National Labor Relations Act that employees enrolled in a training school operated by the personnel department, and who were not engaged in production or maintenance work, belonged in the stipulated "production and maintenance" unit for which the Union was certified in 1941, the Board, in an unfair labor practice complaint proceeding under Section 10 of the Act, held that petitioner in 1962 violated Section 8(a)(5) of the Act when it refused to bargain with the Union over the wages and conditions of employment of enrollees in such a training school which it established in the latter year. The court below, rejecting the erroneous reasons advanced by the Board for its finding—which were predicated on the false premise that its "general practice" had been to include such trainees in the bargaining unit—and conceding petitioner's good faith belief that the "trainees" were not within the unit, made its own find-

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[1] Numbers following the abbreviations "J.A." refer to pages of the Joint Appendix in the court below, nine copies of which have been filed with the Court.

ing regarding the placement of the school "trainees" in the unit and enforced the Board's Section 10 order.

The questions presented to this Court are:

1. When the employer's good faith in questioning the union's claim to represent certain employees is unchallenged, may the Board by-pass the representation procedures specified by Congress in Section 9 of the Act for the resolution of such questions and find the employer guilty of a refusal to bargain in an unfair labor practice complaint proceeding under Section 10 of the Act, notwithstanding the absence of a prior finding in a proceeding under Section 9 that the union is, in fact, the representative of the employees involved?

2. May the Board in such a situation by-pass the procedures of Section 9 by erroneously asserting that its "general practice" is to include the questioned employees in the bargaining unit and place the burden on the employer to prove that it was the intent to *exclude* employees of this nature from the certified unit, thereby shifting the burden from the General Counsel, where the burden of proof rests, of proving that it was the intent to include them in the unit?

3. Upon being shown the error of the Board's decision, may the court of appeals in a Section 10 review proceeding undertake the function reserved exclusively to the Board in Section 9 of the Act, and make its own findings regarding the unit placement of the employees in question and enforce the Board's Section 10 order which had been predicated on a clearly erroneous premise?

STATUTE INVOLVED

The statutory provisions involved are Sections 8(a) (1) and (5), 9 and 10 of the National Labor Relations Act (herein called the Act). They are printed in Appendix B hereto, *infra,* pp. 7a-14a, insofar as pertinent.

STATEMENT OF THE CASE

1. The Facts

The Section 10 refusal to bargain finding of the Board is predicated on petitioner's refusal in 1962 to bargain with the union which represented its production and maintenance employees over the working conditions of employees while in a newly-established training school operated by its personnel department. As the facts recited below show, the refusal to bargain finding was not preceded by a finding in a representation proceeding under Section 9 of the Act that such trainees properly belonged in the unit. Nor did the Board in the unfair labor proceeding under Section 10 of the Act make such a finding. The facts are as follows:

In 1941, and until 1952, the plant of petitioner (herein called Hamilton) was located in East Hartford, Connecticut, adjacent to the plant of the Pratt & Whitney Division of United Aircraft Corporation (J.A. 132-133, 120). In 1941, a school was operated by Pratt & Whitney's Personnel Department in Hartford for the training of employees for both Hamilton and Pratt & Whitney (J.A. 133 120).

On July 8, 1941, following an election, Lodge 743, International Association of Machinists (herein called the Union) was certified by the Board, pursuant to

Section 9 of the Act, as the bargaining representative in a unit described as the "production and maintenance employees" of Hamilton (J.A. 130). The unit description was stipulated by the parties, not found by the Board.[2] No reference was made in the stipulated bargaining unit description to "trainees" (J.A. 130), and the General Counsel offered no evidence in the instant unfair labor practice complaint proceeding conducted under Section 10 of the Act to suggest that "trainees" voted in the 1941 election conducted under Section 9 of the Act. There has been no other proceeding under Section 9 of the Act.

In the first contract, executed on July 16, 1941 (within eight days of the certification), the Union and Hamilton expressly stipulated that "apprentices, trainees, students" were excluded from the bargaining unit (J.A. 171). In 1942, those words were omitted from the contract because Hamilton "at that time" had "no trainees or apprentices or students in its" employ (J.A. 139, 132, 173). Although those words also were omitted from succeeding contracts, during World War II Hamilton's employees continued to be trained at the Pratt & Whitney Hartford school (J.A. 136), and it is uncontradicted that at no time were the "trainees" in the school ever regarded as being in the union production and maintenance bargaining unit (J.A. 132-135, 119-120).

Employees at Hamilton trained "on the job" under supervision of the production departments have always

[2] The only issue represented to the Board for determination in the Section 9 proceeding was whether the employees of Pratt & Whitney within the stipulated unit description, as well as those of Hamilton, should be included in the election unit. See *United Aircraft Corp.*, 32 NLRB 79, 82.

been regarded as within the production and maintenance unit (J.A. 118-119, 121, 122-123, 135-136), and job classifications have been set up for such trainees in some of the production departments (J.A. 118, 72, 161-164).

In the fall of 1962, James Vandervoort, Hamilton's Personnel Manager (J.A. 116), after discussion with his superior, Morgan Mooney, Personnel Director for United Aircraft Corporation (J.A. 128, 131), decided to establish Hamilton's own training school, "similar" to the one at Pratt & Whitney, to "up grade" the skills of its present employees and to train newly hired personnel to meet the "problem" presented by the unavailability of skilled workers (J.A. 113, 119, 127, 69).

The school was to be established as a subdepartment of the Personnel Department (J.A. 114, 116), and to be limited to about 15 enrollees (J.A. 115). Enrollees in the school were to train under supervisors working for the Personnel Department (J.A. 114-116) and were to wear badges showing their assignment to this subdepartment of the Personnel Department (J.A. 116). The school was to be located in an area set apart from the production area (J.A. 113-114). The program drawn up was for a 22-week course (J.A. 113). The first 15 weeks were to be spent entirely within the segregated school area in classroom work and training on school machines (J.A. 113-114). The last 7 weeks were to be spent on the "shop floor" in the limited production department (J.A. 114, 115-116); it was anticipated that later the school would train employees also for the experimental department because of the similar skills involved (J.A. 114). During the 7 weeks on the "shop floor", the enrollees were to continue to wear their Personnel Department badges and to work ex-

clusively under the Personnel Department supervisor (J.A. 115-116). At no time during the 22-week school period were the "trainees to work under supervision of the production or maintenance personnel (J.A. 116), or to engage in production or maintenance work (J.A. 12 fn. 7, 126, 115-116). At the conclusion of the 22-week course, the "trainee", if satisfactorily completing the course, would move into the limited production department (J.A. 70); if not, and if previously an employee of Hamilton, he normally would be returned to his former department (J.A. 117, 125, 70-71).

Because the enrollees in the school would be segregated from and completely outside the normal flow of production (J.A. 126), Vandervoort (with Mooney's concurrence) concluded that the "trainees", while enrolled in the training school, would not constitute a part of the production and maintenance bargaining unit (J.A. 127-128). Accordingly, Vandervoort on October 12, 1962, by notices posted in the plant, announced the establishment of the training school and commencement of the first class on November 5 (J.A. 67, 116, 158). The notices set forth the school program and requirements for admission, and employees meeting the requirements were invited to apply (J.A. 158).

On October 18, Union President Seedman met with Vandervoort to discuss the new training school (J.A. 116, 68). During the meeting, Vandervoort fully explained the need for the training school, how it would operate, the requirements for admission, the wage rates which would be paid the enrollees, and the placement of the enrollees upon completion of the course (J.A. 69-71, 116-117). At this meeting, and at a subsequent meeting. Seedman claimed that the training school enrollees should be in the Union's production and main-

tenance bargaining unit (J.A. 71-72, 76, 116). Vandervoort disagreed and the school started on November 5, as advertised in the October 12 announcement (J.A. 77). On November 29, instead of instituting a proceeding under Section 9 of the Act, the Union filed the unfair labor practice charge herein claiming that Hamilton had violated Section 8(a)(5) of the Act by refusing to bargain in respect to the school "trainees" (J.A. 142).

At the hearing on the Section 10 unfair labor practice complaint, the General Counsel offered no evidence to show that the intent of the parties in 1941 was to include school "trainees" in the certified production and maintenance unit, and offered no evidence to refute the inference to the contrary flowing from the absence of reference to such in the stipulated unit description, from the expressed exclusion of such in the first contract description of the bargaining unit, and from the Union's absence of claim to represent such while in training school during the war years. Moreover, the General Counsel offered no evidence to refute the fact that United Aircraft Corporation consistently, and successfully, had maintained that "trainees" in a school or formalized program—as distinguished from "trainees" who may get their training "on the job" as part of and under direct supervision from the production department—did not belong in its production and maintenance units. See, *e.g., United Aircraft Corporation, Pratt & Whitney Aircraft Division,* 124 NLRB 392; also *supra,* p. 5. Instead, the General Counsel, in essence, bottomed his case upon the proposition that it was a *per se* violation of the Act for an employer to refuse to bargain with a representative of production and maintenance em-

ployees concerning the terms and conditions of employment of employees in a training school, even when the school is being conducted as part of a personnel department whose complement of workers is clearly outside the Union's bargaining Unit.

2. The Board's Decision and Order

The Board's decision affirmed, without discussion, the Trial Examiner's conclusion that Hamilton's refusal to bargain with the Union over the wages, hours, and terms and conditions of employment for the employees agreeing to participate in the training program was a violation of Sections 8(a)(5) and (1) of the Act (J.A. 2), and entered an unrestricted order directing Hamilton to bargain with the Union concerning "trainees while assigned to a training school" (J.A. 5-6).

The Trial Examiner, however, had found neither that it was the intent of the parties in 1941 to include school "trainees" in the certified bargaining unit, nor that the enrollees in Hamilton's training school—which was established for the first time in 1962 and whose enrollees were not to be engaged in production or maintenance work and would, instead, be part of and under the excluded Personnel Department—on the facts developed by the General Counsel in the complaint proceeding properly belonged in the Union's production and maintenance unit. Rather, the Trial Examiner erroneously (as will be shown below) adopted the premise that it has been the Board's "general practice" to include "trainees" "in the unit, when a question regarding their inclusion has been raised", and from this false premise concluded that "the trainees involved would normally be regarded by the Board as part of

the unit for which the Union is the certified representative" (J.A. 17). Predicated on this fallacious conclusion, the Trial Examiner relieved the General Counsel of the burden of proving his case, as is required, and shifted to Hamilton the responsiblity of sustaining "its argument for a contrary result" (J.A. 17).

Thus, instead of inquiring as to whether the General Counsel by a "preponderance of the testimony" (Section 10(c), *infra*, p. 11a) had, as he is required, proven that it was the intent of the parties to *include* the "trainees" in the stipulated unit, the Trial Examiner twisted the matter into a supposed default by Hamilton with the statement "There is no showing that it was the intent of the parties to *exclude* trainees from the unit as stipulated at the time of the election" (J.A. 18; emphasis added).

In sum, despite the absence of a finding in the 1941 representation proceeding, or in a subsequent one, that Hamilton's school "trainees" properly belonged in the production and maintenance unit certified, or evidence that they voted in the election, and not withstanding that "trainees" were expressly excluded from the bargaining unit in the contract executed immediately after the certification, and in disregard of the 21-year bargaining history of exclusion of school "trainees" from production and maintenance units by Hamilton and its sister division, Pratt & Whitney, and in total disregard of the fact that the "trainees" while in the school here were totally out of production and under the Personnel Department, the Trial Examiner, instead of appraising the evidence in accordance with the standard of proof required of the General Counsel in an unfair labor practice proceeding under Section 10 of the Act (proof by a "preponder-

ance of the testimony"), erroneously held that it was the Board's "general practice" to include trainees in the bargaining unit (it will be shown below that under contest the Board in other cases had excluded similar "trainees") and compounded this error by shifting the burden from the General Counsel, where it belonged, of proving Hamilton's guilt to Hamilton to prove its innocence.

The Board's Decision and Order rests solely upon this spurious reasoning of the Trial Examiner. Hamilton's good faith in challenging the Union's right to represent the school "trainees" was not questioned by the General Counsel, the Trial Examiner, or the Board. In such circumstances, questions of this nature must, under the statutory scheme, be resolved through the representation procedures of Section 9 of the Act, not through the unfair labor practice procedures of Section 10 of the Act.

3. The Second Circuit's Decision

In the court of appeals below Hamilton, on petition for review, challenged the decision and order of the Board on various grounds. *First,* on the ground that the Board had never found in a representation proceeding under Section 9 of the Act (*infra,* p. 7a) that Hamilton's school "trainees" belonged in the certified production and maintenance unit. *Second,* on the ground that the company's 21-year collective bargaining history negated any inference that they did. *Third,* on the ground that, contrary to the assumption of the Trial Examiner, the Board has no "general practice" to include school "trainees" in a production and maintenance bargaining unit. *Fourth,* on the ground that the Board *did not find* on the evidence be-

fore it in the complaint proceeding that the school "trainees" involved in fact did belong in Hamilton's production and maintenance unit. *Fifth*, on the ground that the General Counsel here had not met his burden, in a complaint proceeding, of proving every element of his case by a "preponderance of the testimony", including the necessary element of bad faith in Hamilton's refusal to agree that the school "trainees" belonged in the production and maintenance unit.

The court of appeals, while rejecting Hamilton's challenges to the Board's actions, nevertheless recognized the fallaciousness in the Board's reasoning predicated on the erroneous premise that it was "general practice" to include "trainees" in the bargaining unit. Discarding this reasoning, the court analyzed the evidence in the complaint case and found that "the new training program would seem most properly to be includible in the production and maintenance workers bargaining unit" (*infra*, p. 5a).

In doing so, the court erroneously assumed that it is "regular procedure" for questions concerning the proper unit placement of employees to be presented and resolved *initially* in unfair labor practice complaint proceedings under Section 10 of the Act (*infra*, p. 5a), thus completely ignoring the scheme of the Act which provides for such questions to be resolved by the Board under the investigatory representation procedures of Section 9 of the Act (*infra*, p. 7a). As authority for its position the court below cited its earlier decision in *N.L.R.B.* v. *Burroughs Corp.*, 261 F. 2d 463 (*infra*, p. 5a). That case, however, refutes rather than supports this proposition because that case came to the court on a specific finding by the Board in a representation proceeding under Section 9 that the employees involved constituted an appropriate unit for bargain-

ing, which finding the employer sought in the subsequent complaint and enforcement proceedings to overturn. *Here there was no prior Section 9 finding in respect to the "trainees".*

The court below rejected as of "no consequence" the conceded fact that Hamilton's position "was undertaken in the good faith belief that the trainees were not members of the bargaining unit", predicating this on the Sixth Circuit's decision in *Old King Cole, Inc.* v. *N.L.R.B.*, 260 F. 2d 530 (*infra*, p. 5a). But, again, the court below misapplied the law to the facts here. *Old King Cole* was another situation in which, in the subsequent complaint and review proceedings, the employer sought to reverse specific findings made in a proceeding under Section 9. Obviously, in such a situation, as the Sixth Circuit properly held (at p. 532), good faith is not a defense. But, as will be shown below, such plainly is determinative in circumstances like those here.

REASONS FOR GRANTING THE WRIT

1. The Board's resolution of the question concerning the proper unit placement of the school "trainees" in a Section 10 unfair labor practice complaint proceeding rather than through a Section 9 investigatory representation proceeding and the court's decision enforcing the Board's order, disregard the clear statutory separation of the Board's functions under these two sections, and are in conflict with this Court's decisions delineating the authority of the Board under each section. The difference in authority of the Board under the two sections was clearly set forth by this Court in *American Federation of Labor* v. *N.L.R.B.*, 308 U.S. 401, at p. 405, as follows:

> By the provisions of the Wagner Act [which insofar as material here remain intact in the Labor-

> Management Relations Act of 1947, as amended] the Board is given two principal functions to perform. One, defined by § 9, which as enacted is headed "Representatives and Elections", is the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of employees. The other, defined by § 10, which as enacted is headed "Prevention of Unfair Labor Practices", is the prevention by the Board's order after hearing and by a further appropriate proceeding in court, of the unfair labor practices enumerated in § 8, 29 U.S.C.A. § 158. . . .

Continuing, the Court observed (at p. 406) of Section 10—

> . . . Nowhere in this section is there mention of investigations or certifications authorized as defined by § 9. . . .

In similar vein this Court stated in *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, at p. 153:

> . . . the "appropriate unit" is the one declared by the Board under Section 9(b). . . .

If otherwise, the provisions of Section 9 of the Act—providing, *inter alia*, for decision by the Board "in each case" as to the "unit appropriate for the purposes of collective bargaining" (Sec. 9(b)), the determination of a "question of representation" by the Board "upon the record" of a hearing before a hearing officer "who shall not make any recommendations with respect thereto" (Sec. 9(c)(1)), and the issuance of a certification concerning a question of representation which does not have the force of an order (Sec. 9(c)(1))—would be emasculated.[3] Instead of the Board having

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[3] By amendment to the Act in 1959, the Board was authorized to delegate certain of its powers to its regional directors (Sec. 3(b) of the Act).

exclusive authority to decide appropriate units and other questions of representation, the Board's authority would be diluted by the General Counsel's exclusive control over the issuance and prosecution of complaints (Sec. 3(d)). Instead of the impartial determination of questions of representation by Board members "isolated" even from "recommendations" of the hearing officer (see S. Min. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 33; *Legislative History of Labor Management Relations Act,* 1947, v. 1, pp. 495-496), there would be a partisan presentation of the issues, as here, in the General Counsel's complaint, a partisan prosecution of the complaint, as here, by counsel for the General Counsel, including a partisan presentation of facts and law, a "decision" (not merely a "recommendation") by a trial examiner, as here, on the facts and the law which the Board has only limited authority to review, and a "rubber stamping" of the trial examiner's decision, as here, by the Board. Instead of the certification regarding the question of representation having no force, there would be, as here, an order with sanctions. Thus, the carefully specified procedures provided by Congress in Section 9 for the impartial resolution of questions of representation would, contrary to the intent of Congress, be circumvented by direct resort to the partisan unfair labor practice procedures of Section 10.[4]

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[4] Section 9(d) specifies that the certification and record of hearing shall be included in the transcript of record to be filed in the court of appeals in any proceeding under Section 10(e) or 10(f) to enforce or review any subsequent order of the Board issued in an unfair labor practice proceeding under Section 10 predicated on the prior proceeding under Section 9 (infra, p. 10a). Obviously none was filed in the instant Section 10 proceeding as there was none dealing with the issue.

The Trial Examiner, with the subsequent sanction of the Board, sought to remove the instant determination of unit placement of employees from the investigatory provisions of Section 9 and transplant it into the unfair labor practice provisions of Section 10 by asserting that it was the "general practice" of the Board to "include [trainees] in the unit, when a question regarding their inclusion has been raised", citing two Board cases which did not support his assertion (J.A. 17).[5] However, Section 9(b) provides that the Board "shall decide in each case . . . the unit appropriate for the purposes of collective bargaining" (*infra*, p. 7a).

But assuming that, in situations where the *bona fides* of the employer's questioning of the unit placement of the employees are refuted, the Board may by-pass the investigatory procedures of Section 9 and, relying on its "general practice" in other cases regarding the placement of similar employees, proceed directly by way of Section 10 to an unfair labor practice finding and order, such clearly was not warranted in the instant matter. Hamilton did not refuse to bargain with the Union regarding the employees traditionally in a producton and maintenance unit. It merely refused in good faith to bargain regarding a limited number of employees while they were in a training school operated by the *personnel department* which the Union wanted to *add* to the unit.

Moreover, contrary to the Trial Examiner's assertion, the Board has no "general practice" to include "trainees" of the nature here involved in a production and maintenance unit. Instead, on challenge it has excluded them. See, *Consolidated Aircraft Corp.*, 47

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[5] In neither of the cases cited did the employer contend that the "trainees" should be excluded from the bargaining unit.

NLRB 30, 33-34; *Higgins-Tucker Motor Co.*, 51 NLRB 394, 396; *Newport News Shipbuilding & Dry Dock Co.*, 57 NLRB 1053, 1059. At no time during this litigation has the Board cited a single case in which segregated school "trainees" have been included in a production and maintenance unit over the employer's objection.

What is presented here is similar to what this Court referred to in *N.L.R.B.* v. *Falk Corp.*, 308 U.S. 453, at p. 459—

> ... Here, the Board's order that the employer cease its unfair labor practices ... was not based in whole or in part upon facts certified as the result of an election or investigation made by the Board pursuant to Section 9(c)....

Even the court of appeals rejected the foregoing assertion of the Trial Examiner. Instead, it conceded Hamilton's good faith and undertook to resolve the question by making findings of its own regarding the placement of the "trainees" within the bargaining unit which only the Board, proceeding under Section 9 of the Act, is empowered to make (see *infra*, pp. 7a-8a).

Where, as here, the employer's good faith is unchallenged it is uniform practice of the Board to resolve questions like the one here in a Section 9 proceeding, not in a Section 10 complaint case. See, *N.L.R.B.* v. *Hannaford Bros. Co.*, 261 F.2d 638, 640, 642 (C.A. 1); *Chalet, Inc.*, 107 NLRB 109, 111; *Little Champ Mfrs., Inc.*, 104 NLRB 985, 993; *Orkin Exterminating Co.*, 136 NLRB 630, 643-644; *Bethlehem Transportation Corp.*, 61 NLRB 1110, 1115-1116; *Charles F. Reichert*, 124 NLRB 28, 29; General Counsel's Administrative Rulings, Case No. F-673 (43 LRRM 1022); Case No. F-729 (43 LRRM 1220); Case No. SR-973 (47 LRRM

1038); Case No. SR-1290 (48 LRRM 1180); Case No. SR-1529 (48 LRRM 1780).

Of course, if the Board may by its holdings here circumvent the provisions of Section 9 of the Act, it is readily apparent that it may do so for similarly unsupportable reasons in countless other situations. It is important to the administration of the Act, and especially Section 9 thereof, that the Board be required to adhere to the statutory scheme enacted by Congress and to this Court's decisions delineating this scheme.

2. The court below, when it departed from the erroneous reasoning of the Board for finding that employees while enrolled in the Personnel Department's training school were part of the production and maintenance unit (*supra*, p. 12) and undertook to make its own findings regarding the unit placement of the "trainees" to support the Board's order under Section 10, plainly exceeded its authority under the Act by substituting itself for the Board in an area clearly reserved to the Board under Section 9 of the Act.

As this Court stated in *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, at p. 152:

> The Labor Act places *upon the Board* the responsibility of determining the appropriate group of employees for the bargaining unit. . . . (Emphasis added)

Again in *N.L.R.B.* v. *Falk Corp.*, 308 U.S. 453, at p. 458 the Court noted—

> . . . But Section 9 of the Act vests power in the Board, *not in the courts,* to select the method of determining what union, if any, employees desire . . . . (Emphasis added)

See also *N.L.R.B.* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226.

In *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, at p. 491, this Court noted the "broad discretion to determine appropriate units" which "Section 9(b) of the Act confers upon the Board" and the "circumscribed" power of the courts (emphasis added). See also, *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 134.

Just as the Act makes no provision for direct review by the courts of proceedings under Section 9 of the Act (see *American Federation of Labor* v. *N.L.R.B.*, 308 U.S. 401, 409; *N.L.R.B.* v. *International Brotherhood of Electrical Workers*, 308 U.S. 413; *Boire* v. *Greyhound Corp.*, 84 S. Ct. 894, 896-899), it likewise contains no authorization for the courts to make findings regarding appropriate units and their composition.

Plainly, therefore, the court below exceeded its authority in the instant matter and should be reversed.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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December 1964

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 376—September Term, 1963
(Argued May 26, 1964 Decided July 8, 1964)
Docket No. 28490

UNITED AIRCRAFT CORPORATION (HAMILTON STANDARD DIVISION), *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Before:

LUMBARD, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Petition to review and set aside a decision and order of the National Labor Relations Board, 144 NLRB No. 56, which found that petitioner had violated §§ 8(a)(5) and (1) of the National Labor Relations Act. Cross-petition by the Board to enforce its order.

Enforcement granted. Petition to review and set aside denied.

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LUMBARD, *Chief Judge:*

The question presented is whether trainees enrolled in the "Limited Production Machinist Program" instituted by the petitioner, United Aircraft Corporation, in its Hamilton Standard Division, located in Windsor Locks, Connecticut, were members of the bargaining unit represented

by Lodge No. 743, International Association of Machinists. We find substantial evidence in the record to support the National Labor Relations Board's determination that the trainees were members of the bargaining unit and that the petitioner violated §§ 8(a)(5) and (1) in refusing to bargain with the union with regard to the working conditions of the trainees.

The union was certified in 1941 as the bargaining representative of the production and maintenance employees of United's Hamilton Standard Division. In their first collective bargaining agreement, negotiated in 1941, the parties described the bargaining unit as excluding "apprentices, trainees [and] students . . ." No mention has been made of trainees in the ten collective bargaining agreements entered into since that time.

Prior to 1952 the Hamilton Standard Division was located in East Hartford, Connecticut, on property contiguous to United's Pratt and Whitney Division. Some employees of both divisions attended a training school established by United in Hartford, some distance from the plants, and operated intermittently since 1941. These trainees were deemed outside the bargaining unit and were not represented by any union. No Hamilton Standard employees attended the training school subsequent to the end of World War II, and it appears that after 1942 no members of the production and maintenance bargaining unit attended the school.

In October 1962 the company posted a notice on its bulletin board announcing the establishment of a "Limited Production Machinist Program" to increase the qualified personnel in the Limited Production Department, which produces items in small quantities after development in the experimental department but prior to full production. The notice described a 22-week program, of approximately 15 weeks of classroom work and machine operation in the Machine School Training Area, which is set apart from

the regular operational areas of the factory, plus 7 weeks of on-the-job training in the Limited Production Department. Preference was to be accorded the company's own employees, although enrollees were also to be accepted from without the company's work force. Those who satisfactorily completed the course were to be assigned permanent places in the Limited Production Department, the remaining trainees to be returned to their prior jobs, if available. Regular employees in the Limited Production Department are members of the bargaining unit represented by Lodge 743, as are other production employees to whom United gives on-the-job training.

Shortly after posting of the notice, Butler Seedman, president of the union, met with James Vandervoort, personnel manager of the company, who stated the company's position that enrollees in the training program would not be members of the bargaining unit and consequently would not enjoy the benefits of the collective bargaining agreement during their tenure as trainees. Seedman replied that he would have to consult with other union officials in order to present the union's position on the question. At a second meeting Seedman stated the union's position that trainees would be members of the bargaining unit and indicated that if the company commenced operation of the school the union would take all necessary steps to protect the rights of the employees. Seedman then wrote Vandervoort asking whether the company had changed its position, to which apparently there was no written reply. Thereafter, following the opening of the training school the union, on November 29, 1962, filed charges with the Board alleging violations by the company of §§ 8(a)(5) and (1).[1]

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[1] Section 8(a) provides:

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .

(5) to refuse to bargain collectively with the representatives of his employees . . ."

The company maintains that the history of its negotiations with the union indicates that trainees had been excluded from the production and maintenance workers bargaining unit and that in any event it has committed no unfair labor practices inasmuch as it refused to bargain with the union as the result of a good faith belief that the trainees were not properly members of the bargaining unit. We disagree with both propositions.

The exclusion of trainees from the 1941 collective bargaining agreement is of little significance in determining the parties' intentions with regard to the treatment of trainees. The 1941 program was conducted in East Hartford, at some distance from the factories, whereas the present program is conducted on the very premises where the members of the bargaining unit normally work. Moreover, the employees enrolled in the 1941 program were drawn from two divisions of United Aircraft—one unrepresented by any union—and returned to these separate divisions after the training period. By contrast, trainees in the Limited Production Machinists Program are drawn for the most part from the production and maintenance workers bargaining unit and in all likelihood will either return to their previous jobs or remain in the Limited Production Department, which likewise is represented by Lodge 743. Thus, in negotiating the 1941 agreement the parties were dealing with a significantly different training program.

That the subsequent collective bargaining agreements failed to mention trainees is explained by the fact that after 1941 no members of the bargaining unit attended the East Hartford training school and accordingly there was no occasion further to consider the problem. Thus we find little support for the company's claim that the union acquiesced in the exclusion of trainees from the bargaining unit. Indeed, as soon as the company made known its intention to establish a new training school, the union objected.

Employees enrolled in the new training program would seem most properly to be includible in the production and maintenance workers bargaining unit. The trainees for the most part come from and will return to production departments. They have a vital interest in the wages, hours and working conditions of the production workers. Moreover, the entire bargaining unit has a strong interest in the training program, for example, to see that wages are not undercut by those trainees who perform normal production work. In short, there is a strong community of interest between the trainees and the other members of the bargaining unit, see, e.g., *N. L. R. B.* v. *Belcher Towing Co.*, 284 F. 2d 118, 121 (5 Cir. 1960), and there is thus sufficient evidence in the record to support the Board's conclusion that the trainees are members of the production and maintenance employees bargaining unit.

That the company's refusal to bargain was undertaken in the good faith belief that the trainees were not members of the bargaining unit is of no consequence. See *Old King Cole, Inc.* v. *N. L. R. B.*, 260 F. 2d 530, 532 (6 Cir. 1958). The regular procedure for challenging the appropriateness of a bargaining unit is to refuse to bargain and then defend against an unfair labor practice charge on the ground that the unit is inappropriate. See, e.g., *N. L. R. B.* v. *Burroughs Corp.*, 261 F. 2d 463 (2 Cir. 1958). The challenge is ordinarily made in good faith as it was here.

The petition to review and set aside the Board's order is denied; the cross-petition for enforcement is granted.

Decree

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Before:

LUMBARD, *Chief Judge*,
WATERMAN and HAYS, *Circuit Judges*.

THIS CAUSE came on to be heard upon the petition of United Aircraft Corporation (Hamilton Standard Division) to review and set aside an order of the National Labor Re-

lations Board issued against the Petitioner on September 11, 1963, and upon the cross-petition of the National Labor Relations Board to enforce such order. The Court heard argument of respective counsel on May 26, 1964, and has considered the briefs and the transcript of record filed in this cause. On July 8, 1964, the Court, being fully advised in the premises, handed down its opinion enforcing the order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that United Aircraft Corporation, Hamilton Standard Division, its officers, agents successors, and assigns abide by and perform the directions of the Board in said order contained.

/s/ J. EDWARD LUMBARD
Judge, United States Court of Appeals for the Second Circuit

/s/ STERRY R. WATERMAN
Judge, United States Court of Appeals for the Second Circuit

Filed: July 27, 1964

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Petition for Rehearing

REILLY AND WELLS
Washington 5, D. C.
For Petitioner

Petition for rehearing denied.

J.E.L.
S.R.W.
P.R.H.
U.S.C.J.J.

21 September 1964

APPENDIX B

Labor Management Relations Act, 1947, as amended 1959 (29 U.S.C. Sec. 151 *et seq.*):

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

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REPRESENTATIVES AND ELECTIONS

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to asure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is

appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him

a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a

consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to Section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

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PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the

Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair

labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time,

upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new find-

ings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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